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IN THE

Supreme Court of the United States

October Term, 1960

NO. 426

JOHN KIRSCHKE, ET AL., *Appellants*,

v.

THE CITY OF HOUSTON, *Appellee*.

Appeal from the Supreme Court of Texas

BRIEF OF APPELLANTS IN REPLY TO THE BRIEF OF APPELLEE, THE CITY OF HOUSTON IN OPPOSITION TO APPELLANTS' APPEAL

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This brief is filed by John Kirschke, et al., Appellants, in reply to the brief of Appellee, The City of Houston, which was filed in opposition to Appellants' appeal and Appellants' statement as to the jurisdiction.

The brief of Appellee does not purport to be a motion to dismiss as authorized by Rule 16. However, if the Court should consider the brief as a motion to dismiss, we point

out to the Court that it was not filed within thirty (30) days after the receipt and filing of Appellants' jurisdictional statement. Appellants' jurisdictional statement was filed in this Court on September 20, 1960; Appellee's brief was not filed within thirty (30) days thereafter as required by Rule 16.

* * *

The brief of the Appellee is helpful in that it demonstrates that the sole and only defense upon which the Appellee actually relies, is the doctrine of governmental immunity from suit even when constitutional rights are involved. The City of Houston must admit that governmental immunity from suit is not a constitutional doctrine, but soleley a doctrine developed through common law. The City advocates that the doctrine of sovereign immunity has supremacy over the constitutional guaranties of due process of law and just compensation where private property is taken for public use.

Thus, The City of Houston advocates governmental absolutism, and asserts that "the King can do no wrong" even when constitutional rights and immunities of the individual are involved.

The Appellee has asserted certain defenses under the police power which are clearly not available to The City of Houston under the facts found in the decision of the Court of Civil Appeals, as well as under the allegation of Appellants' petition, which allegations must be accepted as true for the purposes of this appeal. The Appellee took no appeal from the findings of the Court of Civil Appeals, and therefore the Appellee is bound by such findings.

We know that the Court of Civil Appeals has found that,

"The City by refusing such permit is in effect illegally interfering with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof." *City of Dallas v. McElroy*, Tex. Civ. App. 254 S.W. 599, Er. Dis.; *Span v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 19 A.L.R. 1387; *City of Dallas v. Mitchell*, 254 S.W. 944, Er. Ref.

The cases cited by the Court of Civil Appeals in the above finding substantiate that there has been a "taking" under the law of the State of Texas; however remembering that Federal questions only are here involved.

Certainly, unlawful interference with the lawful and legitimate use of property prior to a legal taking thereof, constitutes a depredation upon property rights without due process of law. Appellants contend that there can be no taking prior to the institution of formal legal condemnation proceedings. If this were true, there could never be any relief for an individual whose property had been thus taken, because an individual cannot force a governmental authority to institute eminent domain proceedings. It was for just this situation that the constitutional guaranty against taking of private property without adequate compensation was incorporated in our constitution.

* * *

The City of Houston urges that it is a Home Rule City, and that it had a right to require building permits under the police power. Here again the City of Houston advocates governmental absolutism, and asserts that because the City of Houston has a right to require building permits, and because it has control over its public streets, that it has control over its public streets, that it has the right to exercise such powers arbitrarily, unreasonably, fraudu-

lently, and without good faith. Even though it has the right to exercise such powers, it has no right to exercise such powers arbitrarily and unreasonably. The Court of Civil Appeals in addition to holding that The City of Houston illegally interfered with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof, further held that,

> "We think the council has arbitrarily and unreasonably denied the permit."

The Appellants plead that the permit was denied arbitrarily, capriciously, and fraudulently.

It is a universally accepted rule that if the police power and regulation goes too far, it will be recognized as a "taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (415), 67 L. Ed. 322 (326), 43 S.C.T. 158. It is obvious then that the Appellee has no basis in law to claim governmental absolution when there is an excessive or fraudulent exercise of the police power. Further, the Appellee will not face up to the fact that the Court of Civil Appeals has held that there has been an abuse of the police power and that the denial of the permit was "unreasonable and arbitrary."

* * *

The City of Houston then finally goes to the extreme in the assertion of governmental absolutism, and states that there was no taking for *"public use."* This is an unforgivable position to be taken by any governmental body either great or small. The City of Houston thus asserts that even though there has been a taking of property, and an illegal interference with a lawful and legitimate use of their property prior to a legal taking thereof, the individual citizen

has no rights because the property was not taken for a public use. In this situation the Appellee urges that where the taking is merely the insolent abuse and exercise of municipal power, and where the property is not taken for public use, then the individual property owner is without rights.

There is no question but that the "taking" of property by the City of Houston in this instance was for a public use. Exhibit "C" and the findings in the Court of Civil Appeals definitely establish that the taking was for highway purposes. Certainly highway purposes constitute a "public use." But suppose the "taking" was not for a public use, but merely an "unreasonable" and "arbitrary" interference with the right of ownership and use of private property, is this action justifiable, when such taking is not for public use but simply through the insolence and abuse of governmental authority; if the City just took the property of an individual without any specific reason, and not for any public purpose, but just to be taking it, then certainly the citizens' right to compensation should be even stronger than if the property were taken for public use. Otherwise, due process of law, and right of individual property, private enterprise and freedom of the individual become nothing except oratorical phrases or as Justice Brewer stated, "They amount to a mere brutum fulmen."

This position is taken by the Appellee undoubtedly in an effort to establish that unless there has been a taking of private property for a public use, then there has been no violation of constitutional rights under the Fourteenth Amendment, and no violation of the rights of the Appellants under the Fifth Amendment. The position is taken

that since the "unreasonable" and "arbitrary" taking or interference was not for public use, the Appellants have not sustained the loss of any property rights under the Federal Constitution. Here we have the question stated with all of its grim and unbearable implications. The City of Houston urges that it can do no wrong and that it is immune from suit if it deprives a citizen of the lawful use of his property, just so long as it does not take the property for public use.

Is it true that an individual citizen has no rights under the Constitution of the United States when his property is arbitrarily and unreasonably taken, and when the right to the lawful and legitimate use of his property is denied him by a governmental body, not for public use, but arbitrarily and unreasonably, or for no reason at all? Can the governmental body assert its sovereign immunity, and the individual citizen must go uncompensated? Will this Court tolerate such a doctrine?

Certainly such an unwarranted taking and/or interference would constitute a violation of due process of law, and a denial of equal protection of the law under the Fourteenth Amendment to our Federal Constitution.

However, we again urge upon this Court the importance of the Ninth Amendment to the Constitution, and this is a case in which it is directly applicable. Certainly the right to own property is a basic individual right and liberty. Certainly the right to own private property is one of the liberties that is the very basis of our governmental compact. Certainly even prior to the enactment of the Fourteenth Amendment, the individual citizen, as a fundamental and inherent right, was entitled to own private property

immune from the unlawful taking, interference and depredations on the part of governmental agencies.

Yet, until the passage of the Fourteenth Amendment, except for the language assuring due process in the Fifth Amendment to the Constitution, there was no language in the Constitution that expressly guaranteed these rights in express language. We therefore, respectfully urge the Court to fully consider and give weight to the Ninth Amendment which gives protection to these unenumerated rights which were so inherent and fundamental that they were taken for granted by the framers of the Constitution. We sincerely hope that this Court will feel that if the Fourteenth Amendment is not applicable, or even if it is applicable in this case, that the Ninth Amendment will be and should be enforced to protect these rights which are not specifically enumerated.

As we read the authorities, an appeal exists as a matter of right if authorized under Title 28, U.S.C., Section 1257 (2), if the ordinances and legislative acts of the City of Houston are repugnant to the Constitution of the United States, and if the question raised is a substantial constitutional question. We respectfully urge that there could hardly be any constitutional question that could be more substantial than the abuse which is now prevalent among many governmental agencies, in the freezing of the lawful and legitimate use of private property on the ground that the governmental agency might some time in the future want to condemn the property for public use.

WHEREFORE, Appellants pray that if the brief of Appellee shall be construed as a motion to dismiss, that said motion shall be overruled and that this Honorable Court

will accept and note jurisdiction of this cause as prayed for in Appellants' original jurisdictional statement.

The undersigned certifies that a copy of the foregoing reply brief has been served upon the Legal Department of The City of Houston by depositing same in the United States mail, with sufficient postage, duly certified, addressed to the Honorable Homer T. Bouldin, Assistant City Attorney, City Hall, Houston Texas, prior to the date of filing with the Clerk of the Supreme Court of the United States.

Respectfully submitted,

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